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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007 Misc.

JOHN WILLIAM BUTENKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 885

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, which is not
officially reported, is printed in the appendix to the
petitions.

(1)

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1967. By orders of October 25, November 3, and November 14, 1967, Mr. Justice Brennan extended the time for filing the petitions for certiorari herein to December 5, 1967, and they were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED*

1. Whether the trial judge, who examined the reports of the agents who testified at trial, properly determined that certain of the reports did not relate to their direct testimony.

2. Whether, in the circumstances of this case, petitioners were prejudiced by the fact that the three co-conspirators who had diplomatic immunity were declared by the United States Government to be *persona non grata* and directed to depart from the country.

3. Whether there was probable cause for the arrest of petitioner Ivanov which justified the search of the automobile in which he was riding.

4. Whether the evidence was sufficient to sustain Ivanov's conviction.

*With regard to fn. 1 appended to the statement of "questions presented" in No. 885, it has been determined that there is nothing to disclose pursuant to the policy of the Department of Justice as described to this Court in the government's memorandum opposing rehearing recently filed in *Kolod et al. v. United States*, No. 133.

STATEMENT

After a jury trial in the District of New Jersey, petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. 794 (a) and (c) (Count One), and of conspiring to violate 18 U.S.C. 951 by causing Butenko unlawfully to act as an agent of the Soviet Union without prior notification to the Secretary of State (Count Two). Butenko was also convicted of the substantive offense of unlawfully acting as an agent of the Soviet Union in violation of 18 U.S.C. 951 (Count Three). Butenko received concurrent sentences of 30 years, 10 years and 5 years' imprisonment on the three counts on which he was convicted, and Ivanov received concurrent sentences of 20 years' imprisonment on Count One and 5 years on Count Two. The court of appeals affirmed the conviction of Butenko on all counts, affirmed Ivanov's conviction on Count One, but set aside his conviction on Count Two.¹

The government's evidence at trial established that petitioners were engaged in a conspiracy with three Russian diplomats, Gleb A. Pavlov, Yuri A. Romashin, and Vladimir I. Olenov, to transmit to the Soviet Union information relating to the command and control system of the Strategic Air Command of the United States Air Force.

Butenko, an American citizen, was employed by the International Electronic Company which was under

¹ The court of appeals held that the government had failed to prove that Ivanov knew that Butenko had not registered with the Secretary of State and, therefore, reversed the conviction on Count Two. The government is not seeking review of that ruling by the court of appeals.

contract with the United States Air Force to produce a command and control system for the Strategic Air Command (R. 114).² This system, which includes data processing and computer programming equipment, is designed to store and transmit operational information such as the location of aircraft and distances from targets which will enable the commander of the Strategic Air Command to alert and execute all his forces at an extremely rapid rate and provide him with up-to-the-minute information on the status of the total force. By combining the data programmed into the system with current information which it receives, the command system allows the SAC commander instantly to form a plan of attack and to calculate the number of aircraft or missiles needed, the refueling problems and the attrition rate (R. 111-114, R. 1769). The information supplied by the system may be provided either as a picture projected on a screen or printed in page form (R. 114).

Butenko, who had top-secret clearance, was Control Administrator for the project's field operations division, which was responsible for the development of installations at the various air and missile bases (R. 116-118). Butenko's top-secret clearance gave him access to "top-secret," "secret" and "confidential" documents, and "secret" and "confidential" documents passed through his division in the normal course of its operations.

Butenko's illegal involvement with petitioner Ivanov and the officials of the Soviet Union was es-

² References in the form "R." are to the stenographic transcript of the trial and references in the form "M. Tr." are to the transcript of the pre-trial hearing on the motion to suppress.

established by the testimony of agents of the Federal Bureau of Investigation who surveilled several meetings which Butenko had with the Russians and who arrested petitioners on the evening of October 29, 1963.

April 21, 1963

At 6:34 p.m. on this date a station-wagon owned by Amtorg Trading Company and driven by Gleb Pavlov left petitioner Ivanov and Vladimir I. Olenov at a restaurant in Closter, New Jersey (R. 347-359, 480-483). Pavlov continued driving, and after making a series of U-turns parked opposite the China Chalet Restaurant in Closter at approximately 7:00 p.m. At that time Butenko drove his car into and through the China Chalet parking lot, and about a minute later Pavlov and Butenko met in the parking lot of a nearby supermarket (R. 360-361, 645, 480-481). Pavlov left his car emptyhanded and entered Butenko's car. After a short time he emerged carrying a tan briefcase (R. 361-362, 536-538, 586). Pavlov then returned to the restaurant, where he had left Ivanov and Olenov. At approximately 8:05 Pavlov rejoined Butenko and the two of them went to a different restaurant (R. 365, 484-485, 540). At 8:50 Pavlov left Butenko, returning shortly thereafter. Twenty minutes later Pavlov and Butenko left together (R. 366).

May 26 and 27, 1963

At approximately 6:10 p.m., on May 26th Ivanov was observed driving a station-wagon, in which Pavlov and Olenov were seated, in the vicinity of the supermarket parking lot where Butenko and Pavlov had

met on April 21. The station-wagon proceeded back and forth past the lot three or four times (R. 614-616). At approximately 7:00 p.m. Butenko, who had been observed earlier that evening leaving his home carrying a tan attaché case, drove his car into the supermarket lot (R. 589, 616-617). Within a few minutes the station-wagon, occupied only by Pavlov, entered the parking lot, turned toward Butenko's car, and drove out (R. 618). Butenko followed Pavlov and they drove past the Old Hook Inn where Ivanov and Olenov were standing on the side of the road (R. 618-619, 676-677). Ten minutes later Pavlov drove back and picked up Olenov and Ivanov (R. 737-738). At 8:00 p.m. Butenko was observed at the bar in the Florentine Gardens Restaurant. He remained there until 10:00 p.m., but on four separate occasions between 8:00 and 10:00 p.m. he left the bar and went to his car and looked in both the front and back seats as well as the trunk (R. 768-770).

The next day Pavlov was observed leaving the Soviet Mission to the United Nations carrying a reddish-brown briefcase. At 8:00 p.m. that evening Pavlov met Butenko, and when Butenko returned to his home he was carrying an identical reddish-brown briefcase (R. 825-826, 837-838, 887-889).

September 23 and 24, 1963

On September 23, 1963, Butenko was observed as he drove his car in the area of Ridgewood, New Jersey, making a series of U-turns and in general following a circuitous route (R. 910-920). This was apparently a dry-run, for the following night Butenko drove almost the identical circuitous route, eventually

arriving at the parking lot of the Gold Key Restaurant. At this time, Pavlov and Romashin were observed standing in a shopping-center parking lot across the street, looking toward the Gold Key. After ten or fifteen minutes Butenko drove out of the parking lot and was followed by Pavlov and Romashin. Later that evening, Butenko and Pavlov were observed driving together (R. 921-925).

October 29, 1963—the Night of the Arrest

From 6:00 p.m. to 6:15 p.m. on this evening, Ivanov, Pavlov and Romashin were observed walking and driving in the general vicinity of Dean Street in Englewood (R. 1022-1025). From 7:00 to 7:30 p.m. they drove in and out of and back and forth through the Englewood Railroad Station parking lot with Pavlov driving at one point and Ivanov driving at another (R. 1062-1065). At 7:37 Butenko's car entered the railroad station lot and then left. At 7:40 the Soviets entered and left the railroad station lot in their car. At 7:45 Butenko again drove in and out of the railroad station lot. At 7:55 Butenko returned to the parking lot, parked, turned off his headlights and turned on his parking lights. Within a few minutes the Soviet car, with Pavlov driving and Ivanov in the front seat, drove into the station diagonally opposite Butenko's automobile, and the headlights were turned off and the parking lights turned on. Then the Soviet car backed out of its space, came around the railroad station and parked perpendicularly to the rear of Butenko's car. After about 35 seconds the Soviet car pulled away and Butenko proceeded to follow it. The F.B.I. agents then moved in and

arrested Butenko in his car and Ivanov and Pavlov in their car. (R. 1064-1068, 1141, 1156, 1332-1333).

At the time of the arrest the agents found in the Soviet car an attaché case that Butenko had been carrying earlier that evening, which contained two International Electronic Company documents relating to the command control system that the company was developing for the Air Force (R. 1246-1249, 1291, Gov. Exhs. 28A and 28B). The agents also found in the Soviet car a document-copying camera and a film canister, as well as a radio-signaling device and receiver (R. 1163-1170, 1453-1457). At the time of the arrest Butenko had in his wallet a piece of paper on which there was a map of the route he had followed on September 23 and 24, as well as a list of 19 separate 5-digit numbers. These numbers were identified as the numbers of 19 International Electronic Company documents relating to the command control system and included the numbers of the two documents which were in the attaché case found in the Soviets' car at the time of the arrest (R. 1604-1615, Gov. Exhs. 28A, 28B, 39).

ARGUMENT

1. After the F.B.I. agents testified on direct examination at the trial, the government made available to defense counsel all the reports that related to the direct testimony. Other reports or statements prepared by the witnesses, which the government believed did not relate to the direct testimony, were submitted to the court for inspection *in camera*. After examining the reports submitted to it, the trial court determined that these were not statements to which the defendants were entitled under the Jencks Act (18 U.S.C. 3500).

(This Court has recognized that when the disputed materials have been submitted to the trial judge for his inspection and he has determined that they are not within the Jencks Act, that ruling should not be overturned unless clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493; *Palermo v. United States*, 360 U.S. 343, 353. The statements examined by the district court in this case related to the investigation in general and not to the events and activities about which the particular witnesses testified. Thus, there is no reason to find an abuse of discretion by the trial court in this case.

2. Petitioners were not deprived of any right to compulsory process under the Sixth Amendment, or deprived of a fair trial in any respect by the action of the United States in causing a diplomatic note to be sent to the Permanent Mission of the U.S.S.R. to the United Nations declaring co-conspirators Paylov, Romashin and Olenov to be *persona non grata*, and thereby causing their departure from this country. A review of the record shows that there is no basis for petitioners' contention that the expulsion of the co-conspirators deprived the defense of the opportunity to secure the "cooperation of" the three Russian diplomats in meeting the charges.

On October 30, 1963, the United States Department of State caused a diplomatic note to be sent to the Soviet Mission to the United Nations concerning the involvement of Pavlov, Romashin and Olenov in espionage activities against the United States. Therein, the three Soviet diplomats were declared to be *persona non grata*, and it was requested that they depart

the United States on or before November 1, 1963. On that date, counsel for Butenko, in a telegram addressed to the Department of State, requested a stay of the terms of the diplomatic note in order that he might confer with the Russian diplomats. On the same day, the Department of State sent a telegram to counsel for Butenko, stating that the expulsion order would be suspended until November 4, 1963. Despite this, the three Russian diplomats departed this country on November 1, 1963.

On August 6, 1964, the district court granted Butenko's motion³ to take oral depositions of Yuri A. Romashin, Gleb A. Pavlov and Vladimir I. Olenév at the government's expense, on condition that the defense show that the witnesses were willing to testify by deposition and that the Soviet government would permit the taking of their depositions.

On October 5, 1964, immediately prior to the trial, Butenko moved for an adjournment for the purpose of determining further whether or not the terms and conditions of the court's order of August 6 could be met. At that time, counsel for Butenko represented to

³ An application for leave to take the depositions or otherwise secure the testimony of the three Soviet diplomats was never made by defendant Ivanov, who himself was a Russian national, employed by an agency of the U.S.S.R. However, in the course of argument of Butenko's motion for an adjournment to determine whether the deposition could be obtained, counsel for Ivanov stated that it was his position that such an application on his part was unnecessary, because any deposition which might be taken would require Ivanov's counsel's presence, since testimony would be given which would be used at the trial. Ivanov did not represent to the court that any attempt had been made on his part to communicate with the Soviet authorities regarding Butenko's application to take depositions or to send Letters Rogatory.

the court that he had thus far been unable to secure any answer from the Soviet authorities with regard to satisfaction of the conditions of the court's order. This request for adjournment was denied on the ground that more than ample time had been provided within which the terms and conditions of the court's order could be met.

Pursuant to Section 15 of the "Headquarters Agreement," the co-conspirators Pavlov, Romashin and Olenov were "entitled in the territories of the United States to the same privileges and immunities, * * *, as is accorded to diplomatic envoys to it." In accordance with the provisions of 22 U.S.C. 252, accredited diplomatic envoys are immune from civil and criminal process of the United States courts. Accordingly, as accredited representatives of the Permanent Mission of the U.S.S.R. to the United Nations, compulsory process could not attach to Pavlov, Romashin and Olenov (R. 3917). See *In re Dillion*, Fed. Cas. No. 3,914 (N.D. Cal. 1854).

We submit that since the testimony of the three Soviet diplomats could be secured only through their wholly voluntary cooperation, it is immaterial whether they were afforded an opportunity to cooperate voluntarily in this country, or whether that opportunity was afforded to them some place in the Soviet Union.* By its order of August 6, 1964, the district court established sufficient means whereby the defendant could secure and preserve the testimony of the co-conspirators if they were willing to so testify. The actions of the Department of State in suspending its order of

* This is particularly true where a Soviet national is on trial and that government has guaranteed his presence at the trial.

November 1st to November 4, 1963, showed the good faith intentions of the United States Government to cooperate with counsel for Butenko if the Russian diplomats were so disposed.

As the Second Circuit recognized in *United States v. Greco*, 298 F. 2d 247, 251, certiorari denied, 369 U.S. 820:

* * * the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it: * * * The fact that appellant could not compel the attendance of * * * witness[es] * * * did not deprive him of any constitutional right.⁵

This is not a case like *United States v. Powell*, 156 F. Supp. 526 (N.D. Cal. 1957). In *Powell*, the only factor which prevented the possible attainment of witnesses on behalf of the defense was the refusal of the United States to issue a passport. Here, compulsory process was never available because the diplomatic status of the three co-conspirators meant that they could appear as witnesses only through their voluntary acts. The declaration that the three were *persona non grata* did not prevent them from cooperating with the defense either in this country or in Russia under the court's order of August 6, 1964.

3. There is no merit to petitioner Ivanov's contention that the F.B.I. agents did not have probable cause to arrest him without a warrant and to search his car on the evening of October 29, 1963. A review

⁵ See, also, *Gorin v. United States*, 313 F. 2d 641 (C.A. 1); cf. *Earl v. United States* (C.A.D.C., No. 19316, decided April 25, 1966).

of the record demonstrates that the agents' observations of Ivanov's activities on that evening, coupled with their knowledge of his prior activities and those of his co-conspirators, gave the agents probable cause to believe that he was an active participant in the conspiracy to transfer to the Soviet Union information relating to the national defense of the United States.

On the evening of April 21, 1963, Ivanov had been observed in the company of Pavlov just prior to his meeting with Butenko. The surveillance of the activities of Butenko and Pavlov later that evening gave the agents reasonable grounds to believe that Butenko delivered a briefcase to Pavlov, who gave it to Olenov and Ivanov for a short time and then retrieved it from them and delivered it back to Butenko's car. On May 26, 1963, Ivanov was observed driving with Pavlov back and forth past the parking lot where Pavlov later met Butenko and the surveillance of Butenko and Pavlov on that and the following day again gave the agents reasonable grounds to believe that Butenko had delivered documents to Pavlov which were later returned to him.

Any doubt that might have existed concerning Ivanov's involvement in the conspiracy was dissipated by the agents' observations of his activities prior to his arrest on the evening of October 29. Ivanov and Pavlov shared the driving that evening as they drove back and forth through, and in and out of, the parking lot at the Englewood Railroad Station in an obvious effort to assure themselves that they were not under surveillance. Ivanov was then in the car when, after the parking-light signal

was exchanged with Butenko, the Soviet car drove up and stopped perpendicularly to Butenko's car. These activities clearly gave the agents probable cause to believe that Ivanov knew the nature of the activities in which he was engaged and was far from an innocent bystander.

Since the agents did have ample probable cause to believe that Ivanov was an active member of the conspiracy, they were justified in arresting him without a warrant and searching the car. *Brinegar v. United States*, 338 U.S. 160; *Draper v. United States*, 358 U.S. 307.*

4. The above review of the evidence of Ivanov's participation in the conspiracy also demonstrates that the evidence was sufficient to warrant his conviction. The additional fact that documents relating to the command control system were found in the car with Ivanov at the time of the arrest, together with photographic equipment and electronic signalling devices, further substantiates his guilt.

* The attaché case containing the documents was removed from the Soviets' car at the time of the arrest (M. Tr. 151-152). The contents of the shopping-bags found in that car were thoroughly examined at the time of the arrest but were not actually removed until the car was brought to the Hackensack office of the F.B.I. (M. Tr. 125-127, R. 1156-1174). The trial judge correctly concluded that "[i]t was reasonable * * * for the agents not to remove the items from the automobile until their arrival at Hackensack" (M. Tr. 162).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals as to both petitioners should be affirmed.

Respectfully submitted.

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